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No. 99-1947

In the Supreme Court of the United States

ALEXANDRIA HISTORICAL RESTORATION AND PRESERVATION COMMISSION, ET AL., PETITIONERS

v.

FEDERAL HIGHWAY ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
LOIS J. SCHIFFER
Assistant Attorney General
JOHN A. BRYSON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

ROSALIND A. KNAPP
Acting General Counsel
PAUL M. GEIER
Assistant General Counsel for Litigation
EDWARD V.A. KUSSY
Acting Chief Counsel
Federal Highway Administration
Department of Transportation
Washington, D.C. 20590

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QUESTION PRESENTED

Whether the Federal Highway Administration, in the preparation of an environmental impact statement for the replacement of the Woodrow Wilson Bridge, made a reasonable determination to eliminate from further evaluation alternatives accommodating only ten lanes of traffic, on the ground that such alternatives would not adequately serve the project's underlying purpose of alleviating current and future traffic congestion and improving safety.

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OPINIONS BELOW

The opinion of the court of appeals (Pet App. 1a-24a) is reported at 198 F.3d 862. The opinion of the district court (Pet. App. 27a-53a) is reported at 46 F. Supp. 2d 35.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1999. A petition for rehearing was denied on March 7, 2000 (Pet. App. 25a). The petition for a writ of certiorari was filed on June 5, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, requires federal agencies to prepare an environmental impact statement for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(C). As part of that statement, the agency must "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. 1502.14(a); see 42 U.S.C. 4332(C)(iii).

2. The Woodrow Wilson Bridge is a six-lane drawbridge that carries Interstate Highways I-495 (the Capital Beltway) and I-95. Pet. App. 27a. Although the bridge was "originally intended to serve as a Washington bypass for interstate travelers, it became increasingly used by commuters as the region's population grew." *Id.* at 2a. The bridge was opened to traffic in 1961 and was designed to accommodate approximately 75,000 vehicles per day. *Id.* at 27a-28a. Traffic volume has increased to approximately 160,000 vehicles per day, however, with substantial further increases projected during the next 20 years. *Id.* at 2a, 28a. As the court of appeals explained,

> congestion is particularly acute during peak hours, where the configuration of an eight-lane Beltway feeding into a six-lane bridge—in addition to steadily increasing local traffic in the surrounding communities—has produced one of the worst rush-hour "bottlenecks" in the region. These congestion problems have created harmful collateral consequences: the heavy volume on the Bridge has contributed to an accident rate nearly double that of similar

> facilities in the region, and has expedited the deterioration of the Bridge's structure to the point where the Bridge is projected to be structurally unsound by 2004.

Id. at 2a.

More than ten years ago, respondent Federal Highway Administration (FHWA), in cooperation with agencies of Maryland, Virginia, and the District of Columbia, began to evaluate alternatives for replacing the bridge. Pet. App. 2a. In 1997, the FHWA issued its Final Environmental Impact Statement (FEIS). *Id.* at 4a. The FEIS evaluated in detail a "no-build" and seven "build" alternatives. *Ibid.* Each of the "build" alternatives utilized a 12-lane design. *Ibid.* The FEIS presented as the preferred alternative two parallel drawbridges on the existing alignment with a 70-foot clearance over the navigational channel. *Ibid.*

"Although the [FEIS] discussed narrower eight- and ten-lane options, it did not afford them full treatment as formal 'alternatives' because the [FHWA] concluded, on the basis of traffic projections, that narrower river crossings would fall short of meeting the Bridge's long-term traffic needs." Pet. App. 4a.[1] In particular, the FHWA's traffic analyses showed that petitioners' preferred ten-lane configuration "would be able to accommodate less than half of the per-hour capacity of the [FHWA's] preferred alternative, causing peak-hour traffic queues of significantly greater length and extended duration." *Id.* at 11a. The FHWA's studies also

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[1] The FHWA is required to design Interstate highways so as to be able to "handle the type and volumes of traffic anticipated for [a] twenty year period." 23 U.S.C. 103(c)(1)(B)(i) (1994 & Supp. IV 1998); 23 U.S.C. 109(b) (1994 & Supp. IV 1998).

projected that accident rates would be "markedly higher on a ten-lane structure." *Ibid.*

3. The City of Alexandria filed suit in federal district court, challenging the FHWA's decision. Pet. App. 5a. Petitioners intervened as plaintiffs and continued to prosecute the suit after the City settled its claims. *Ibid.* The district court granted petitioners' motion for summary judgment. *Id.* at 27a-53a.

The district court held, *inter alia*, that the FHWA's failure to consider a ten-lane project violated its obligation under NEPA to consider all "reasonable alternatives." Pet. App. 39a-45a. The court stated that

> the limited analysis the FHWA did on a ten-lane alternative demonstrates that it could possibly provide a partial solution to the problem. The FHWA's own traffic analysis of a ten–lane alternative demonstrates that it can handle up to 295,000 vehicles per day. This is close to total satisfaction of the estimated maximum 300,000 vehicles per day which will cross the river in 2020. To eliminate all ten-lane alternatives from "rigorous" consideration simply because they fall short of the total future estimated demand by 2 percent does not stand up to the rule of reason which must guide the agency in making its determination.

Id. at 44a.[2]

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[2] The district court found that the FHWA had committed an additional NEPA violation by failing to undertake a sufficient analysis of the construction impacts of the preferred alternative. Pet. App. 45a-47a. The court also held that the FHWA's approval of the preferred alternative violated Section 106 of the National Historic Preservation Act, 16 U.S.C. 470f, and Section 4(f) of the Department of Transportation Act, 49 U.S.C. 303, which require the agency to identify historic and other protected properties that

4. The court of appeals reversed. Pet. App. 1a-24a. The court explained that the "reasonable alternatives" for which detailed study is required under NEPA are identified

> in light of the objectives of the federal action * * *. But that approach of course requires that [the court] first consider whether the agency has reasonably identified and defined its objectives. * * * [The court] engage[s] in both of these inquiries—whether an agency's objectives are reasonable, and whether a particular alternative is reasonable in light of these objectives—with considerable deference to the agency's expertise and policy-making role.

Pet. App. 9a. The court held that the FHWA's "stated objectives were reasonable," observing that "it is not unreasonable in articulating its objectives for an agency to focus primarily on transportation and safety issues when replacing a massively congested and structurally unsound bridge." *Id.* at 10a (internal quotation marks omitted). The court also upheld the FHWA's conclusion that a ten-lane alternative was not "reasonable" in light of the stated objectives of the highway project. *Id.* at 10a-11a. The court explained that the agency had "focused specifically * * * on the traffic needs that will exist twenty years after the project's approval, and

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may be affected by a highway project. See Pet. App. 47a-51a. The court of appeals reversed those rulings, see *id.* at 14a-24a, and petitioners do not press those claims in this Court.

The district court also held that the FHWA had failed to ensure that the project would conform to regional air quality standards, as required by the Clean Air Act, 42 U.S.C. 7506(c)(2). See Pet. App. 36a-39a. The FHWA did not appeal that aspect of the district court's decision, but chose instead to conduct a revised conformity analysis. See *id.* at 5a n.2.

its analyses based on 2020 traffic projections demonstrate that a ten-lane bridge would be insufficient." *Ibid.*

As we explain above (see p. 4, *supra*), the district court placed substantial reliance on an FHWA study "showing that a ten-lane bridge would be able to accommodate up to 295,000 vehicles per day, a number only slightly smaller than the projected daily traffic flow on the Bridge in 2020." Pet. App. 11a. The court of appeals found the district court's reliance on the daily capacity figure, in isolation, to be unwarranted. The court of appeals explained that the study "apparently assumed an even flow of traffic throughout the day (which, of course, is unrealistic). Whatever the total number of vehicles that will cross in a 24-hour period, the relevant question is how long during peak commuting hours it will take to cross the bridge." *Ibid.* With respect to that question, the court of appeals credited agency studies showing that petitioners' preferred ten-lane design "would be able to accommodate less than half of the per-hour capacity of the [FHWA's] preferred alternative, causing peak-hour traffic queues of significantly greater length and extended duration." *Ibid.*

Finally, the court of appeals rejected petitioners' contention that a ten-lane project could be regarded as a "reasonable alternative" even if it would "not offer a complete solution to the problem" that the new construction was intended to address. Pet. App. 11a. The court explained that

> within the context of a coordinated effort to solve a problem of national scope, a solution that lies outside of an agency's jurisdiction might be a "reasonable alternative"; so might an alternative within

> that agency's jurisdiction that solves only a portion of the problem, given that other agencies might be able to provide the remainder of the solution. Such a holistic definition of "reasonable alternatives" would, however, make little sense for a discrete project within the jurisdiction of one federal agency * * *. Concerned with severe traffic conditions in the Capital Region, Congress has authorized the [FHWA] to replace the Woodrow Wilson Memorial Bridge. The [FHWA] has sole responsibility for solving this problem; were it to build a ten-lane bridge, no one else would step in and alleviate the congestion that would result. In this context, it is simply a *non sequitur* to call a proposal that does not "offer a complete solution to the problem" a "reasonable alternative."

Id. at 12a-13a (footnotes omitted).

ARGUMENT

The decision of the court of appeals in this case is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. As the court of appeals recognized (Pet. App. 9a-10a), although NEPA establishes "'significant substantive goals for the Nation,' [the duties it] imposes upon agencies * * * are 'essentially procedural.'" *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227 (1980) (quoting *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 558 (1978)). NEPA does not require federal agencies to elevate environmental concerns over other appropriate considerations in the decision-making process. *Baltimore Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87, 97 (1983).

The EIS required by NEPA must discuss, *inter alia*, "alternatives to the proposed action." 42 U.S.C. 4332(C)(iii). Because the consideration of alternatives is intended to inform both the public and the agency decision-maker, "the concept of alternatives must be bounded by some notion of feasibility." *Vermont Yankee*, 435 U.S. at 551. "Common sense also teaches us that the 'detailed statement of alternatives' cannot be found wanting simply because the agency failed to include every device and thought conceivable to the mind of man." *Ibid.*; see 40 C.F.R. 1502.14(a)-(c), 1508.25(b)(2). The courts of appeals have uniformly recognized that the identification of "reasonable alternatives" requires consideration of the purposes or goals of the proposal before the agency. See, *e.g.*, Pet. App. 9a; *City of Bridgeton* v. *FAA*, 212 F.3d 448, 455-456 (8th Cir. 2000); *Simmons* v. *United States Army Corps of Eng'rs*, 120 F.3d 664, 666 (7th Cir. 1997); *City of Angoon* v. *Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986), cert. denied, 484 U.S. 870 (1987); *Louisiana Wildlife Fed'n* v. *York*, 761 F.2d 1044, 1048 (5th Cir. 1985) (per curiam); *City of New York* v. *Department of Transp.*, 715 F.2d 732, 742-743 (2d Cir. 1983), cert. denied, 465 U.S. 1055 (1984); *Roosevelt Campobello Int'l Park Comm.* v. *EPA*, 684 F.2d 1041, 1047 (1st Cir. 1982).

2. The court of appeals correctly held both that the FHWA had defined its objectives in a reasonable manner, and that the agency had reasonably excluded any ten-lane alternative from full consideration in the final FEIS in light of the purpose and need for the project. With respect to the first point, the court held that the FHWA had acted reasonably in focusing on the extent to which alternative designs would accommodate peak-hour traffic demand. Pet. App. 11a. With respect to the second, the court held that the FHWA had

reasonably relied on traffic studies showing that a ten-lane design "would be able to accommodate less than half of the [FHWA's] preferred alternative, causing peak-hour traffic queues of significantly greater length and extended duration." *Ibid.* The court referred as well to FHWA analyses indicating that "accident rates would also be markedly higher on a ten-lane structure." *Ibid.* Petitioners do not attempt to show that the FHWA acted unreasonably in focusing on peak-hour demand. Nor do they contest the agency's determination that traffic congestion during peak commuting hours would be much more severe, and accident rates significantly higher, under the ten-lane alternative.

Petitioners contend instead that the FHWA was required to undertake a detailed analysis of the environmental impacts of a ten-lane design even if such an alternative would fail to solve the traffic and safety problems that the highway project is intended to address. The court of appeals correctly rejected that contention. See Pet. App. 11a-13a. The court acknowledged that "within the context of a coordinated effort to solve a problem of national scope," an alternative that does not offer a complete solution to an identified problem may still be reasonable, since "other agencies might be able to provide the remainder of the solution." *Id.* at 12a. The court explained, however, that such a conception of "reasonable alternatives" would "make little sense for a discrete project within the jurisdiction of one federal agency." *Ibid.* If the project ultimately approved and constructed by the FHWA had insufficient capacity to accommodate peak-hour traffic demand, "no one else would step in and alleviate the congestion that would result. In this context, it is simply a *non sequitur* to call a proposal that does not 'offer a

complete solution to the problem' a 'reasonable alternative.'" *Id.* at 13a.

3. Petitioners contend (Pet. 8-13) that the court of appeals' decision conflicts with decisions of the Seventh and Eleventh Circuits. That claim is incorrect. The Seventh, Eleventh, and District of Columbia Circuits agree that an agency must reasonably define the objective of a proposed project and that the agency's choice of alternatives must be reasonable in light of the objective. See Pet. App. 9a; *Simmons* v. *United States Army Corps of Eng'rs*, 120 F.3d 664, 668-669 (7th Cir. 1997); *North Buckhead Civic Ass'n* v. *Skinner*, 903 F.2d 1533, 1541-1542 (11th Cir. 1990); *Van Abbema* v. *Fornell*, 807 F.2d 633, 638 (7th Cir. 1986). Those courts also recognize that an agency may not evade its obligations under NEPA through an artificially narrow definition of project objectives. See *Simmons*, 120 F.3d at 666; *Citizens Against Burlington, Inc.* v. *Busey*, 938 F.2d 190, 196 (D.C. Cir.) (Thomas, J.), cert. denied, 502 U.S. 994 (1991); *North Buckhead Civic Ass'n*, 903 F.2d at 1542.[3]

None of the decisions on which petitioners rely supports their contention that this case would have been resolved differently in the Seventh or Eleventh Circuit. In *Simmons*, the court held that the Army Corps of Engineers had failed to consider an acceptable range of alternatives to a proposed dam and reservoir that was intended to supply water to the City of Marion, Illinois, and the Lake of Egypt Water District.

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[3] Although petitioners also rely (Pet. 14) on the dissenting opinion in *City of Bridgeton* v. *Federal Aviation Administration*, 212 F.3d 448, 465 (8th Cir. 2000) (R. Arnold, J., dissenting), the majority opinion in that case is fully consistent with the decisions cited above. See 212 F.3d at 455.

120 F.3d at 666. The Corps had "defined the project's purpose as supplying two users (Marion and the Water District) from a single source." *Id.* at 667. The court of appeals found that purpose to be unreasonably narrow because the Corps had neither considered nor explained why it was preferable that both users be supplied from a single source. See *ibid.* ("At no time has the Corps studied whether this single-source idea is the best one —or even a good one."); *id.* at 668 ("Why the Corps assumed the imperative of a single-source project * * * remained unexplained."). In the instant case, by contrast, the FHWA amply justified its decision to focus on future peak-hour traffic demand, rather than on the theoretical ability of various design alternatives to accommodate the projected *daily* volume of traffic. See Pet. App. 10a-11a.[4]

The court in *Van Abbema* stated that "the evaluation of 'alternatives' mandated by NEPA is to be an evaluation of alternative means to accomplish the *general* goal of an action; it is not an evaluation of the alternative means by which a particular applicant can reach his goals." 807 F.2d at 638. As the second clause of the quoted passage makes clear, the Seventh Circuit's analysis was directed at the situation where a federal agency is called upon to assess a private entity's permit application. The Seventh Circuit held that the agency, in conducting NEPA analysis, may be required to treat

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[4] The court of appeals in this case did not suggest, for example, that the FHWA could justify its refusal to give extensive consideration to a ten-lane alternative simply by defining its objective as the construction of a 12-lane bridge. Such an approach would surely constitute the sort of artificial narrowing of agency objectives that the *Simmons* court warned against. See 120 F.3d at 666. Here, by contrast, the FHWA's focus on accommodating future peak-hour traffic demand reflects intensely practical concerns.

as "reasonable alternatives" measures that a particular permit applicant is incapable of implementing. See *ibid.* ("The fact that this applicant does not own an alternative site is only marginally relevant (if it is relevant at all) to whether feasible alternatives exist to the applicant's proposal."). Because the instant case involves a highway project initiated by the federal government rather than by a private permit applicant, *Van Abbema* is largely irrelevant here.[5]

Finally, in *North Buckhead Civic Association*, the Eleventh Circuit stated in dicta that "an alternative partially satisfying the need and purpose of the proposed project may or may not need to be considered depending on whether it can be considered a 'reasonable alternative.'" 903 F.2d at 1542. The court held in that case, however, that the FHWA was not required to undertake a detailed analysis of the plaintiffs' preferred "no build/heavy rail alternative." See *id.* at 1543. The court explained that while the plaintiffs' preferred approach "would provide additional transportation capacity in the corridor, the problems of surface street congestion would remain completely unresolved." *Ibid.*

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[5] In *Citizens Against Burlington*, the District of Columbia Circuit expressed concern that the *Van Abbema* court's reference to "the *general* goal of an action" might imply that the reviewing court is itself to define the relevant goal. See 938 F.2d at 199. The court explained that "[l]eft unanswered in *Van Abbema* * * * is why and how to distinguish general goals from specific ones and just who does the distinguishing. *Someone* has to define the purpose of the agency action. Implicit in *Van Abbema* is that the body responsible is the reviewing court." *Ibid.* The Seventh Circuit has since recognized, however, that in determining a federal agency's compliance with the requirements of NEPA, a reviewing court owes deference to the agency's definition of a project's goal. See *Simmons*, 120 F.3d at 668-669.

There is consequently no reason to suppose that the Eleventh Circuit would have treated a ten-lane replacement for the Wilson Bridge as a "reasonable alternative" requiring extensive NEPA analysis.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
JOHN A. BRYSON
Attorney

ROSALIND A. KNAPP
Acting General Counsel
PAUL M. GEIER
Assistant General Counsel for Litigation
EDWARD V. A. KUSSY
Acting Chief Counsel
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